

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BERNARD J. MATTER,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF  
CORRECTIONS, BERNARD WARNER,  
MARK STERN, G. STEVEN HAMMOND,  
SUSAN LUCAS, PAT GLEBE, SARA  
SMITH, NORM GOODENOUGH,  
CLIFFORD JOHNSON, ELIZABETH  
SUITER, LARA STRICK, ELIZABETH  
ESCHBACH, BARBARA CURTIS,  
CATHERINE BAUM,

Defendants.

No. C13-5213 RBL/KLS

ORDER TO AMEND OR SHOW CAUSE

Before the Court for review is Plaintiff's proposed civil rights complaint. ECF No. 5. Plaintiff has been granted leave to proceed *in forma pauperis*. ECF No. 4. The Court will not direct service of Plaintiff's complaint at this time because it contains several deficiencies. Plaintiff will, however, be given an opportunity to show cause why his complaint should not be dismissed or to file an amended complaint.

**DISCUSSION**

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a

ORDER TO AMEND OR SHOW CAUSE- 1

1 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
2 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it  
3 lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v.*  
4 *Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984).

5 A complaint or portion thereof, will be dismissed for failure to state a claim upon which  
6 relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief  
7 above the speculative level, on the assumption that all the allegations in the complaint are true.”  
8 See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). Although  
9 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,  
10 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Jenkins v.*  
11 *McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply essential facts that an  
12 inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of*  
13 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

14 Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must  
15 provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it  
16 rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted).

17 Plaintiff purports to sue the Washington Department of Corrections (DOC), Bernard  
18 Warner, the Secretary of the DOC, two chief medical officers, the superintendent of the Stafford  
19 Creek Corrections Center (SCCC), and various DOC health care providers. Plaintiff alleges that  
20 pursuant to a plea agreement in his criminal case, it was agreed that his transfer to DOC custody  
21 would be expedited so that he could receive treatment for Hepatitis C. Before he arrived at the  
22 DOC on April 29, 2011, Plaintiff had been receiving treatment for his condition, including  
23 Interferon and Ribavirin treatment. He alleges that his doctor wanted to continue this treatment  
24  
25  
26

1 for an additional four weeks. He claims that a drug company sponsored his treatment and had  
2 provided \$50,000.00 in medication “that was left in his refrigerator.” Plaintiff claims that “all  
3 the Defendants denied him access to his medication, and put off and denied his treatment based  
4 upon his potential longevity, and most notably, denied him treatment based on WDOC  
5 ‘budgetary concerns.’” ECF No. 5, pp. 3-4. He also claims that he sought continued treatment  
6 and although not indicated based on standard protocol, he was subjected to a very painful and  
7 incomplete liver-biopsy. *Id.*, p. 4.

9 Plaintiff claims that Defendants subjected him to cruel and unusual punishment in  
10 violation of the Eighth Amendment, violated his Equal Protection rights, and retaliated against  
11 him for exercising his right to file grievances. *Id.*, p. 4. He seeks an unspecified amount of  
12 compensatory and punitive damages. *Id.*

13 Based on the foregoing allegations, Plaintiff has failed to state a viable claim under 42  
14 U.S.C. § 1983. To state a claim under 42 U.S.C. § 1983, a complaint must allege both that: (i)  
15 the conduct complained of was committed by a person acting under color of state law *and* (ii) the  
16 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws  
17 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420  
18 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). To be liable for  
19 “causing” the deprivation of a constitutional right, the particular defendant must commit an  
20 affirmative act, or omit to perform an act, that he or she is legally required to do, and which  
21 causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Arnold v.*  
22 *IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

25 Plaintiff complains that he was denied necessary medical treatment and was retaliated  
26 against for filing grievances during his incarceration at WCC. He specifically names Bernard

1 Warner, Mark Stern, G. Steven Hammond, Susan Lucas, Pat Glebe, Sara Smith, Norm  
2 Goodenough, Clifford Johnson, Elizabeth Suiter, Lara Strick, Elizabeth Eschbach, Barbara  
3 Curtis, and Catherine Baum. However, he fails to allege how any of these individuals violated  
4 his constitutional rights. He also names the DOC, which is immune from Section 1983 liability.

5 **A. Medical Treatment**

6 With regard to Plaintiff's claim that he was denied proper medical care, he is advised that  
7 to establish a constitutional violation under the Eighth Amendment due to inadequate or denial of  
8 medical care, a plaintiff must show "deliberate indifference" by prison officials to a "serious  
9 medical need." *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

10 Deliberate indifference to a prisoner's medical needs is defined by the Court as the "unnecessary  
11 and wanton infliction of pain." *Id.* Indifference proscribed by the Eighth Amendment may be  
12 manifested by a prison doctor's response to the prisoner's need, by the intentional denying or  
13 delaying access to medical care, or the intentional interference with treatment once prescribed.

14 *Id.*

15 To succeed on a deliberate indifference claim, an inmate must demonstrate that the prison  
16 official had a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

17 A determination of deliberate indifference involves an examination of two elements: the  
18 seriousness of the prisoner's medical need and the nature of the defendant's response to that  
19 need. *McGuckin v. Smith*, 954 F.2d 1050 (9th Cir.1992). A "serious medical need" exists if the  
20 failure to treat a prisoner's condition would result in further significant injury or the unnecessary  
21 and wanton infliction of pain contrary to contemporary standards of decency. *Helling v.*  
22 *McKinney*, 509 U.S. 25, 32–35; *McGuckin*, 954 F.2d at 1059.

1 Second the prison official must be deliberately indifferent to the risk of harm to the  
2 inmate. *Farmer*, 511 U.S. at 834. To withstand summary dismissal, a prisoner must not only  
3 allege he was subjected to unconstitutional conditions, he must allege facts sufficient to indicate  
4 that the officials were deliberately indifferent to his complaints. *Id.* Differences in judgment  
5 between an inmate and prison medical personnel regarding appropriate medical diagnosis and  
6 treatment are not enough to establish a deliberate indifference claim. *See Sanchez v. Vild*, 891  
7 F.2d 240, 242 (9th Cir.1989). Further, mere indifference, medical malpractice, or negligence  
8 will not support a cause of action under the Eighth Amendment. *Broughton v. Cutter Lab.*, 622  
9 F.2d 458, 460 (9th Cir.1980).

11 Plaintiff must provide factual allegations to describe his claim, including the nature of his  
12 condition, which defendant denied him care or provided inappropriate care and when this denial  
13 occurred. It is not enough for Plaintiff to claim that “all defendants” or that “medical staff”  
14 failed to provide him with adequate medical care. He must name the individuals who denied him  
15 medical care and describe how their failure to do so deprived him of his constitutional rights.

## 17 **B. Retaliation**

18 With regard to Plaintiff’s claim that one or more of the defendants retaliated against him  
19 for filing grievances, he is advised that prisoners have a constitutionally protected right to file  
20 grievances and to pursue civil rights litigation without retaliation. *Rhodes v. Robinson*, 408 F.3d  
21 559, 567 (9<sup>th</sup> Cir. 2005); see also *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir.1997) (prisoner  
22 may not be retaliated against for use of grievance system); *Bradley v. Hall*, 64 F.3d 1276, 1279  
23 (9th Cir.1995) (prisoner may not be penalized for exercising the right of redress of grievances).  
24 To prevail on a retaliation claim under 42 U.S.C. § 1983, a plaintiff must establish that a  
25 defendant or defendants retaliated against him for exercising his constitutional rights; that the  
26

1 retaliatory action chilled the exercise of his First Amendment rights; and that the retaliatory  
2 action failed to advance legitimate penological goals, such as preserving institutional order and  
3 discipline. *Rhodes*, 408 F.3d at 567–68.

4 Plaintiff alleges, in conclusory manner only, that unknown defendants retaliated against  
5 him for filing grievances. This is not sufficient to state a claim of retaliation. Plaintiff must  
6 allege facts describing when, where, and how he was retaliated against. He must describe who  
7 retaliated against him and the nature of the retaliation; *i.e.*, what adverse action was taken against  
8 him that caused him harm because he filed a grievance.

#### 10 **C. DOC As Defendant**

11 Section 1983 authorizes assertion of a claim for relief against a “person” who acted under  
12 color of state law. A suable §1983 “person” encompasses state and local officials sued in their  
13 personal capacities, municipal entities, and municipal officials sued in an official capacity. *Will*  
14 *v. Michigan Department of State Police*, 491 U.S. 58 (1989). “Arms of the State” such as the  
15 Department of Corrections are not “persons” amenable to suit under 42 U.S.C. § 1983. *Id.*, at 70.  
16 Therefore, claims against the Department of Corrections would be subject to dismissal.

18 Due to the deficiencies described above, the Court will not serve the complaint.  
19 However, Plaintiff will be given an opportunity to amend his complaint to cure the above noted  
20 deficiencies. In the amended complaint, Plaintiff must write out short, plain statements telling  
21 the Court (1) the constitutional right Plaintiff believes was violated; (2) name of the person who  
22 violated the right; (3) exactly what that individual did or failed to do; (4) how the action or  
23 inaction of that person is connected to the violation of Plaintiff’s constitutional rights; and (5)  
24 what specific injury Plaintiff suffered because of that person’s conduct. See *Rizzo v. Goode*, 423  
25 U.S. 362, 371–72, 377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).  
26

1 If the person named as a defendant is a supervisory official, Plaintiff must either state that  
2 the defendant personally participated in the constitutional deprivation (and tell the Court the five  
3 things listed above), or Plaintiff must state, if he can do so in good faith, that the defendant was  
4 aware of the similar widespread abuses, but with deliberate indifference to Plaintiff's  
5 constitutional rights, failed to take action to prevent further harm to Plaintiff and also state facts  
6 to support this claim. See *Monell v. New York City Department of Social Services*, 436 U.S. 658,  
7 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).  
8

9 Plaintiff must repeat this process for each person he names as a defendant. If Plaintiff  
10 fails to affirmatively link the conduct of each named defendant with the specific injury suffered  
11 by Plaintiff, the claim against that defendant will be dismissed for failure to state a claim.  
12 Conclusory allegations that a defendant or a group of defendants have violated a constitutional  
13 right are not acceptable and will be dismissed.  
14

15 An amended complaint operates as a complete substitute for (rather than a mere  
16 supplement to) the present complaint and supersedes the original in its entirety. Therefore,  
17 reference to a prior pleading or another document is unacceptable – once Plaintiff files an  
18 amended complaint, the original pleading or pleadings will no longer serve any function in this  
19 case.  
20

21 Plaintiff shall present his complaint on the form provided by the Court. The amended  
22 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a  
23 copy, it may not incorporate any part of the original complaint by reference, it must be clearly  
24 labeled the “Amended Complaint,” and must contain the same cause number as this case.  
25 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation  
26 pages as needed but may not attach a separate document that purports to be his amended

1 complaint. The Court will screen the amended complaint to determine whether it contains  
2 factual allegations linking each defendant to the alleged violations of Plaintiff's rights. The Court  
3 will not authorize service of the amended complaint on any defendant who is not specifically  
4 linked to the violation of Plaintiff's rights.

5 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
6 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
7 raised herein on or before **April 29, 2013**, the Court will recommend dismissal of this action as  
8 frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under 28 U.S.C.  
9 § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three  
10 or more civil actions or appeals which are dismissed on grounds they are legally frivolous,  
11 malicious, or fail to state a claim, will be precluded from bringing any other civil action or  
12 appeal in forma pauperis "unless the prisoner is under imminent danger of serious physical  
13 injury." 28 U.S.C. § 1915(g).  
14

15  
16 **The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.**  
17 **1983 civil rights complaint and for service. The Clerk is further directed to send a copy of**  
18 **this Order and a copy of the General Order to Plaintiff.**

19  
20 **DATED** this 28th day of March, 2013.

21  
22   
23 Karen L. Strombom  
24 United States Magistrate Judge  
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